No. 07-1366

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In The
Supreme Court of the United States

STACEY STANTON; MICHAEL FRIAS; BRIAN LANG; JOHN SPEARMAN; TERRY CONNOR; WILLIAM A. ORDWAY; and LELA STEFFEY, Members of the Arizona License Plate Commission,

Petitioners,

vs.

ARIZONA LIFE COALITION; GARY PAISLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err in holding – in conflict with the Sixth Circuit – that specialty license plates constitute private speech, not government speech, and that the First Amendment therefore gave the Respondents the right to require Arizona to issue a license plate with a message that Arizona does not wish to convey?

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ARGUMENT

Life Coalition gives no persuasive reason for the Court not to grant certiorari. Its defense of the Ninth Circuit's decision is based on an uncritical acceptance of the very test that the Petition asks this Court to review. Its assertion that Arizona's "Choose Life" plate, if issued, will be materially different from Tennessee's "Choose Life" plate suffers the same defect: an automatic acceptance of the questionable analysis and results of applying that test. Asserting that the law in this area is settled, Life Coalition forgets that this Court has not yet either tested the four-factors test or addressed the First Amendment implications of State-issued specialty license plates.

I. The Ninth Circuit's Decision Conflicts with the Sixth Circuit's, and the Ninth Circuit Erred in Concluding that Government Speech Is Not Implicated Here.

Contrary to Life Coalition's assertion, the Ninth Circuit's holding that an Arizona-issued "Choose Life" plate *would not* implicate government speech directly conflicts with the Sixth Circuit's holding that Tennessee's "Choose Life" plate *does* implicate government speech. *Compare Ariz. Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *with Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). Life Coalition asserts that there is no real conflict because they arose from different background facts. (Response at 9.) Life Coalition thereby ignores the reality that both plates convey the same message,

regardless of the manner in which each plate came about. It also blindly accepts the four-factors test, failing to recognize that if a single test could lead to two such diametrically opposed conclusions, it raises serious questions about the logic and efficacy of that test.

Contrary to Life Coalition's assertion, *Arizona Life Coalition* and *Bredesen* do conflict. While it is true that the background facts leading to the issuance of the plates are different in the two cases, the plates – and the message that they convey – are essentially identical. That different programs and different facts led to the creation of these nearly identical license plates does not change the message that they convey. That the Tennessee Legislature created a Tennessee license plate communicates no more a government message to "choose life" than would a nearly identical Arizona plate just because the idea for the latter originated with a private group. The difference between the two cases is that Tennessee is intentionally stating that message and the Ninth Circuit is forcing Arizona to do so. But the average viewer will not know that history and will receive the exact same message from both. That is the weakness of the four-factors test, or at least the Ninth Circuit's application of it here.

A few basic facts demonstrate the frailty of Life Coalition's argument and the illogical result of the Ninth Circuit's application of the four-factors test here, which led it to conclude that a government-issued license plate did not convey a government message.

• One. Governments issue license plates: they manufacture them and distribute them to be attached to automobiles. (In this case, the government even *owns* the plate.)

• Two. People who view license plates know that governments issue license plates.

These two facts lead inexorably to fact three.

• Three. A government-issued license plate conveys a government message to the viewer.

This cannot be helped: the viewer, knowing that the plate is government-issued, cannot help but get the impression that the government is speaking the message contained on the plate, especially the message on the background, as opposed to the changeable identification numbers and letters. New Hampshire plates exhort viewers to "Live Free or Die." New Mexico plates tell viewers that New Mexico is the "Land of Enchantment." Idaho plates tell them that that state has "Famous Potatoes." Utah plates urge people to "Ski Utah." Standard Arizona plates tell viewers that Arizona is the "Grand Canyon State."

If the Ninth Circuit's decision is allowed to stand, some Arizona plates will tell the viewers that Arizona is urging them to "choose life." At the very least, the viewer cannot help but infer that the government is endorsing that message, which is the same thing. Thus, a license plate inherently involves government speech. There might also be elements of private speech involved in the specialty license plate. *See*

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 793, 800, 801 (4th Cir. 2004) (recognizing that specialty license plates involve a hybrid of government speech and private speech) *reh'g & reh'g en banc denied*, 373 F.3d 580 (4th Cir. 2004); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. Davis Law Rev. 1317, 1343 (2004) (specialty license plates are the "state's own speech, informed in part by input from private speakers"). But the Ninth Circuit's failure to recognize the government speech inherent in the specialty license plate at issue here caused it to improperly discount Arizona's interest in controlling its own communications.

Life Coalition also argues that the average viewer is inconsequential because he or she is not an *informed* viewer, not having applied the four-factors test to the license plate to determine the genesis of the plate. (Response at 14.) In essence, Life Coalition is arguing that a second message will make the first message disappear. This argument fails for several interconnected reasons.

First, the argument ignores reality. It is unreasonable to expect that any significant number of viewers would take the time and make the effort to research the origins of the plate to determine whether the government originated the text rather than a private individual or group. Fewer still would have the wherewithal to do so: who, other than lawyers with extra time on their hands, would even think to

do such a thing, let alone know how to do it? The so-called "informed" viewer is not a realistic proposition.

Second, and more fundamentally, the argument's premise is faulty. The research that Life Coalition suggests that the viewer should undertake, if successful, would result only in communicating an additional message to the viewer: the possible initial origins of the plate's message. It *might* make this researcher rethink his or her opinion on whether the State advocates the plate's message. But this second message would not change the communication that already occurred when the person viewed the plate in the first place. And even if this researcher discovered that some private person or organization initiated the suggestion for the message, the fact remains that the message is being broadcast on a state-issued and state-owned license plate that is intimately associated with the State and has the State's name emblazoned across its top. That implies an endorsement, and that is forcing the State to speak a message that it perhaps would rather not.

The vanity license plate that Life Coalition hypothesizes to illustrate its argument in fact demonstrates the opposite point. Life Coalition argues that no reasonable view could seriously believe that "ILUVSUE" on a vanity plate is the government's message. (Response at 14.) This argument obstinately refuses to acknowledge that merely by issuing the plate, the government has endorsed the message – has given it the government's imprimatur. By issuing the plate, it is in effect saying: "This person loves Sue,

and the State approves." If, instead of a message of love for an individual, the personalized plate carried, for example, a message of hatred against a racial or ethnic group, the same imprimatur would adhere. Most viewers would probably correctly surmise that the car's owner, not the State, was the source of this odious message. But the State has still issued the plate and has its name closely associated with it. Those same viewers would therefore wonder why the State granted the plate to that owner, recognizing that allowing the plate is an apparent endorsement of the sentiment. The message that viewers would get from the plate is that the State is saying, "This person hates that group, and the State approves." Even if the State does not, in fact, believe it is okay to proclaim that hatred, the opposite message is inevitably broadcast by the fact that the message appears on the State's license plate. And that message would be perceived by most viewers, including those who are not genuinely obtuse.

Life Coalition's argument also fails because its hypothetical vanity plate differs markedly from the specialty license plate at issue here. Messages in the changeable alpha-numeric portion of vanity plates are much more closely associated with the car's owner because each is unique. Here, by contrast, the message will be conveyed in the background portion of the plate, which is not only far more uniform – it will appear on hundreds or thousands of Arizona plates – but is where States put their own messages, like "Live Free or Die."

All of this demonstrates – contrary to Life Coalition's argument (Response at 13-15) – that the Ninth Circuit did indeed err in holding that the specialty license plate at issue here does not constitute government speech. The license plate – any government-issued license plate – cannot help but communicate a government message. That being so, any test that reaches a contrary result is at least inherently suspect and probably useless.

The Court should review Life Coalition's proposed license plate, which will be on the roads soon if the Ninth Circuit's decision is allowed to stand. (Facsimiles of Life Coalition's proposed plate are found in both the Petition's Appendix at 1d, and the Response's Appendix at 1a.) It cannot reasonably be doubted that the general viewer looking at the license plate would conclude that Arizona is endorsing the Life Coalition and is urging people to "choose life." *See Higgins v. Driver & Motor Vehicle Servs. Branch*, 13 P.3d 531, 541 n.4 (Or. App. 2000) (en banc) (Wollheim, J., concurring) ("The reason why an individual wants a vanity license plate is that the license plate bears the imprimatur of the state."), *aff'd*, 72 P.3d 628 (Or. 2003). The Commissioners pointed out that this evident endorsement is exactly why Life Coalition wants this license plate in the first place. (Petition at 18.) Life Coalition does not even bother to deny it. An endorsement is a communication, and a State's endorsement is government speech. The Ninth Circuit erred in concluding otherwise, and its conclusion conflicts with the Sixth Circuit's holding.

II. This Case Presents a Suitable Vehicle for This Court to Review the First Amendment Question Presented.

This case does appropriately present a question of federal constitutional law. Contrary to Life Coalition's suggestion (Response at 16), the Ninth Circuit did not rest its decision on state law. The court did interpret the Arizona statutes in reaching its conclusion. (App. A at 25a.) But its decision is based on the First Amendment. (App. A at 34a ["[W]e conclude that the Commission acted in violation of the First Amendment."].)

Life Coalition's argument that there is no state interest at stake here because the State invited organizations to apply for plates (Response at 16-17), falls of its own weight. The suggestion that the State of Arizona has no interest in controlling the messages disseminated on its license plates is simply wrong. All States have a legitimate interest in controlling the messages that they convey or are perceived as conveying. It is no different for Arizona and its license plates. At the least, that is a question that this Petition would present for this Court to decide.

Life Coalition's suggestion that the Court ought to wait for another license-plate case before deciding the important issues presented here is imprudent. With the vagaries of litigation, it cannot be safely assumed that those cases will ever reach this Court and present the same issue. (Indeed, in one of those cases, the district court has recently granted summary

judgment to the defendants based on qualified-immunity grounds, holding that the law was not previously clearly established. *Children First Foundation v. Legreide*, No. 04-2137 (D. N.J., mem. dec. issued June 16, 2008)). Meanwhile, the government-speech issue is presented in this case, which is already before the Court. This case presents an opportunity to resolve the government-speech issue for those cases working their way through the courts. Life Coalition's mere desire to get the specialty license plate with its logo and motto *before* this Court addresses the important First Amendment issues that are presented here is not a valid concern.

III. If the Court Does Not Immediately Grant Certiorari, It Should Hold the Case Pending Its Decision in *Summum*.

Life Coalition offers no good reason for the Court not to hold this case pending its ruling in *City of Pleasant Grove v. Summum*, No. 07-665, *cert. granted* Mar. 31, 2008. Life Coalition is correct in asserting that there are differences between the cases: this one involves an automobile specialty license plate while *Summum* involves stone monuments displayed in a public park. (Response at 18.) But that is an unimportant distinction: this case, just like *Summum*, requires an analysis of the government-speech doctrine. Because the Court's eventual holding in *Summum* could have a significant impact on this case, it would be imprudent to deny certiorari outright. If the

Court does not grant certiorari right away, it should at least hold the case pending *Summum*.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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